IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 72-1371

DONALD C. ALEXANDER, COMMISSIONER
OF INTERNAL REVENUE,

Petitioner,

v.

"AMERICANS UNITED" INC., ETC. ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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MOTION FOR LEAVE TO FILE A BRIEF OUT OF TIME AND BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF FOR THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS

The National Jewish Commission on Law and Public Affairs hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* out-of-time. As is indicated by letters on file with the Clerk, the movant has obtained the consent of the parties to this case for the filing of such a brief.

Under Rule 42(2) of this Court, a brief *amicus* must be filed at or prior to the date upon which the brief of the party it supports is to be filed. In this case, the brief submitted herewith should have been filed on or before September 26, 1973, when respondent's brief was due for filing.

Due to a lack of communication and coordination during the summer, counsel for *amicus*, all of whom serve without compensation, only learned recently that the petitioner had filed its brief, and that respondent's brief would be due on September 26, 1973. We have prepared the attached brief as quickly as possible, consistent with the high standards of quality expected of a brief filed in the Supreme Court. We have also submitted a draft of this brief to the petitioner prior to the time his reply brief was due to enable him to reply to this brief as well as the respondent's.

For the foregoing reasons the National Jewish Commission on Law and Public Affairs respectfully requests that leave be granted to file the attached brief *amicus curiae* out-of-time.

Respectfully submitted,

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Brief Of National Jewish Commission On LAW AND PUBLIC AFFAIRS AS *AMICUS CURIAE*

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Brief Of National Jewish Commission On LAW AND PUBLIC AFFAIRS AS *AMICUS CURIAE*

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society
of Hebrew Day Schools
Union of Orthodox Jewish
Congregations of America

INTEREST OF THE *AMICUS CURIAE*

The National Jewish Commission on Law and Public Affairs is a voluntary organization organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern.

The Commission is deeply committed to the preservation of the Constitutional rights of all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the highest form of liberty. The Commission firmly believes that the Free Exercise clause of the First Amendment was designed by the nation's Founding Fathers to prevent the Government from meddling or otherwise interfering with the rights of individuals with respect to religious practices and other matters of conscience. This, in turn, requires that religious institutions be treated fairly and equally at the hands of the Government.

This case presents a crisis of sorts, because the Government asserts, through the medium of one of its agencies — the Internal Revenue Service — the right to determine the permissible limits of protected First Amendment activities. Any attempt to transcend the Government's own unilateral limitations results in financial strangulation through the withdrawal of the organization's tax exemption under § 501(c)(3) of the Internal Revenue Code. Moreover, the Government then asserts that its *ex parte* determination may not be reviewed in any court or, perhaps, may not be reviewed until after a delay of such magnitude that any review becomes meaningless. Judicial sanction of this position would rend the fabric of all Constitutional freedoms.

Although petitioner suggests in his brief (p. 35, n.25) that citizens should not presume that Treasury officials will act in bad faith, political realism makes us much less sanguine about official motivations. We have seen a President prepare his "lists of enemies" and instruct administration officials to "harass" his political opponents. Such actions were taken with the knowledge and consent of top officials. At lower levels of the bureaucracy, it is even more likely that particular administrative employees will attempt to inflect their personal political views into the interpretation of the law without regard to whether such views are correct or consistent with the Constitution.

In a sound Constitutional setting, citizens should not be subject to the arbitrary decisions of individual Government officials without recourse to the judiciary. Indeed, our entire Constitutional system of checks and balances is designed to prevent such a situation. The system least tolerates unchecked power which may chill or otherwise impair the exercise by a citizen of basic Constitutional rights.

In the instant case, it is conceivable that the decision of a single Government official could effectively destroy the ability of a group of citizens to exercise basic First Amendment rights. Unless this Court holds that the aggrieved parties in such situations have immediate access to the courts, the freedom of each and every American will be sorely diminished.

ARGUMENT

THE STATUTORY BARS AGAINST INJUNCTIONS AND DECLARATORY JUDGMENTS IN FEDERAL TAX MATTERS DO NOT APPLY IN THIS CASE.

A. There Is No Bar To Injunctive Relief If The Primary Purpose Of A Suit Is Not To Restrain The Assessment Or Collection Of A Tax

Petitioner contends that respondent's suit cannot be maintained under the terms of the Tax Injunction Act, 26 U.S.C. § 7421(a), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," and The Declaratory Judgment Act, 28 U.S.C. § 2201, which prohibits declaratory judgments "with respect to Federal taxes."

However, petitioner misconceives the thrust of those statutes. As the court of appeals below noted, the *raison d'etre* of § 7421(a) was to prevent intermeddling in the tax collection process. Both the plain language of § 7421(a) as well as previous decisions of both this Court and others establish that the bar of § 7421(a) does not apply to a suit against the Internal Revenue Service where, as here, the purpose of the suit is not to restrain the assessment or collection of a tax. *Allen* v. *Regents*, 304 U.S. 439 (1938); *McGlotten* v. *Connally*, 338 F. Supp. 448 (D.D.C. 1972). Furthermore, although the tax exception of 28 U.S.C. § 2201 would appear to be literally broader than the § 7421(a) prohibition, it has been held to be coterminous therewith. *McGlotten* v. *Connally*, *supra*. Consequently, neither 26 U.S.C. § 7421(a) nor 28 U.S.C. § 2201 are applicable here, and petitioner has cited no authority for their applicability in a case such as this.

Moreover, it is inconsistent to permit a third party to bring an injunction action—free of the bar of 26 U.S.C. § 7421(a) and 28 U.S.C. § 2201—to challenge the § 501(c)(3) status of an organization, *Green* v. *Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970), on final injunction *sub nom. Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), while the organization itself is barred from bringing an identical action to preserve its § 501(c)(3) status. Due process of law and equal protection require uniform access to the courts.

B. There Is No Bar To Relief If There Are Special And Extraordinary Circumstances

This Court has long recognized that, even in the case of suits brought to prevent the assessment and collection of taxes, the bar against injunctive relief is not absolute, and an injunction suit may be maintained if "special and extraordinary circumstances" are present.

Thus, in *Miller* v. *Standard Nut Margarine Co.*, 284 U.S. 498 (1932), this Court enjoined the collection of a tax because of the "special and extraordinary circumstances" therein. And although it held that "special and extraordinary circumstances" did not exist in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), this Court nevertheless confirmed therein that injunctive or declaratory relief could be granted where such circumstances are present. See also, *Dodge* v. *Osborne*, 240 U.S. 118 (1916); *Hill* v. *Wallace*, 259 U.S. 44 (1922). Thus, even assuming that 26 U.S.C. § 7421(a) and 28 U.S.C. § 2201 would otherwise apply, this suit may nevertheless be maintained because of the special and extraordinary circumstances present herein.

C. Special And Extraordinary Circumstances Exist In This Case

(1) Lack Of Recourse To Any Other Tribunal Is A Special And Extraordinary Circumstance.

Numerous cases have held that an action for injunctive relief is not barred where the plaintiff otherwise lacked effective access to a judicial tribunal.

Thus, in *Clark* v. *Campbell*, 341 F. Supp. 171 (N.D. Tex. 1972), *Schreck* v. *U.S.*, 301 F. Supp. 1265 (D. Md. 1969), *Lisner* v. *McCanless*, 356 F. Supp. 378 (D. Ariz. 1973), *appeal to Ninth Circuit pending*, and *Rambo* v. *U.S.*, 353 F. Supp. 1021 (N.D. Ky. 1972), *appeal to Sixth Circuit pending*, it was held that a suit for an injunction is not barred where the Internal Revenue Service has made a jeopardy assessment and failed to follow up with the sixty-day notice of deficiency specified in 26 U.S.C. § 6861(b), where the failure to send the statutory notice prevented the taxpayer from bringing suit in the Tax Court. Even though it was theoretically possible to pay the jeopardy assessment and sue for a refund, the courts noted that a refund suit was an inadequate remedy for the taxpayers because after a jeopardy assessment (and collection) there would probably not be enough assets left in the hands of the taxpayer with which to pay the tax, and payment of the entire assessment is a jurisdictional prerequisite.* *Flora* v. *U.S.*, 362 U.S. 145 (1960).

For similar reasons, it is well established that the Federal district courts may determine and enjoin collection of tax liabilities in bankruptcy and receivership proceedings. See, *e.g.*,

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* *Cf. Irving* v. *Gray*, ____ F.2d ____ (2d Cir. 1973) (73-2 U.S.T.C. ¶ 9581), in which the Court reached a contrary result, based in part on the conclusion that the taxpayer in this situation could sue for a refund notwithstanding an inability to satisfy the *Flora* requirements.

U.S. v. *Mighell*, 273 F.2d 682 (10th Cir. 1960); *National Foundry Co. of N.Y.* v. *Director*, 229 F. 2d 149 (2d Cir. 1956); *Jamy Corp.* v. *Riddell*, 337 F.2d 11 (9th Cir. 1964), *cert. denied* 380 U.S. 953; *In re* Vaughan, *Jr.*, 69–1 U.S.T.C. ¶ 9118 (E.D. Ky. 1968).

Still another line of cases held that the statutes in question did not bar a suit by a person whose own taxes were not in controversy. See, *e.g.*, *Bullock* v. *Latham*, 306 F.2d 45 (2d Cir. 1962); *Long* v. *Rasmussen*, 281 F. 236 (D. Mont. 1922); *Filipowicz* v. *Rothensies*, 31 F. Supp. 716 (E.D. Pa. 1940); *Cf. Farmers Loan & Trust Co.* v. *Pollack*, 157 U.S. 429 (1895); *Brushaber* v. *Union Pac. R.R. Co.*, 240 U.S. 1 (1916); *Schweinler* v. *Manning*, 88 F. Supp. 964 (D.N.J. 1950).* Subsequently, the principle of these cases was codified in 26 U.S.C. § 7426. Yet even after the enactment of § 7426, the underlying principle of that line of cases has retained its independent vitality, and has been applied to allow injunctive relief to a third party challenging the tax exemption of an organization. *McGlotten* v. *Connally*, *supra*; *Green* v. *Kennedy*, *supra*.

In each of these cases, the courts noted that, other than by an injunctive action, the complainant lacked effective access to any judicial tribunal. The absence of any other reasonable opportunity to timely try the issues was considered a critical factor in sustaining jurisdiction.

The Senate Committee Report on the tax exception to 28 U.S.C. § 2201 makes it quite clear that Congress assumed that the statutory bar would apply only to situations where the taxpayer had recourse to either the Tax Court or Federal district courts through a suit for refund or to prevent assessment of taxes (S. Rep. No. 1240, 74th Cong., 1st Sess. 11 (1939–1 Cum. Bull. (Part 2) 651, 657)):

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* This very line of decisions might be considered dispositive in the case *sub judice*, since it is not the respondent's income taxes that are in issue here.

> "Your committee believes that...existing procedure both in the Board of Tax Appeals [now Tax Court] and the courts affords ample remedies for the correction of tax errors."

Thus, Congress premised this provision on the assumption that there was adequate and timely access to the courts. Where such access is lacking, the entire purpose of the statutory clause is clearly inapplicable. Considering the Constitutional problems raised by a denial of any practical access to judicial relief, it is extremely doubtful that Congress intended the statutory bar to apply in such circumstances. The Internal Revenue Code carefully gives every taxpayer at least one timely opportunity to litigate his case. Indeed, it would appear to be petitioner's position that only here, where Constitutional issues are foremost, Congress did not intend to permit effective access to a judicial forum. Such an anomalous result should not be lightly attributed to Congress.

(2) Respondent Lacked Effective Access To Any Other Judicial Tribunal.

The action of petitioner in granting respondent § 501(c)(4) status precluded the respondent from contesting the petitioner's revocation of respondent's § 501(c)(3) status both in the Tax Court (because of the absence of a deficiency) and the Federal district courts (because there would be no income tax due on which to claim a refund).

However, petitioner asserts that respondent theoretically has access to the courts either through a suit for refund of Federal unemployment taxes (for which certain § 501(c)(4) organizations, but not § 501(c)(3) organizations, are liable) or through the technique of having a "friend" make a contribution to the organization and thereafter contest its disallowance as a deduction. These suggestions are simply unrealistic.

The courts have held that mere theoretical access to the judiciary is insufficient to invoke the bar of 26 U.S.C. § 7421(a); rather, the test is the practical availability of such access. Thus, in *Schreck*, *supra*, the court relied on the lack of practical access to a tribunal as the basis for its grant of an injunction. Similar reasoning was used in the bankruptcy cases, *supra*, where a refund suit is, as a practical matter, prevented by the probable lack of sufficient assets remaining in the hands of the bankrupt to pay the full tax. In effect, these cases hold that the ability to sue for a refund must be realistic, practical and available, not merely theoretic and remote.

Petitioner contends that respondent could obtain a decision with respect to its § 501(c)(3) status by litigating its liability for Federal unemployment taxes. That, however, is an impractical suggestion because it does not afford the taxpayer timely access to the courts. First, such a suit could not be instituted until after the respondent had filed a claim for refund with the Internal Revenue Service and the claim was either denied or six months passed without IRS action thereon. It is also certainly conceivable that the IRS might allow the claim for refund without specifying its reason therefor, thereby leaving respondent without even that theoretical avenue to judicial review of the administrative revocation of its § 501(c)(3) status. Just such an approach was used in *Church of Scientology of Hawaii* v. *U.S.*, _____ F.2d _____ (9th Cir. 1973) (32 A.F.T.R. 2d 73–5784); see, also, *Mitchell* v. *Riddell*, 402 F.2d 842 (9th Cir.), *cert. denied*, 394 U.S. 456 (1969).

Moreover, even if the petitioner did permit the respondent ultimately to litigate its liability for unemployment taxes through a refund suit, such a suit could not be commenced until six months after the close of the taxable year in which the issue arose, or as much as eighteen months after the organization's § 501(c)(3) status was revoked. Thereafter, there would be further delay until judgment was rendered in that litigation. During this entire period of time, contributions to the

organization—its very lifeblood—would undoubtedly be reduced to a mere trickle, if that much, thereby effectively precluding the organization from continuing during that time to exercise its Constitutionally protected rights.

Furthermore, it should be noted that it is possible that a § 501(c)(4) organization might be entirely exempt from Federal unemployment taxes. For example, the organization may have no employees to which it paid "wages" of at least $1,500 in any calendar quarter in the calendar year or preceding calendar year. See, 26 U.S.C. § 3306(a) and (c). In such instance, petitioner's suggested avenue for access to judicial review of its *ex parte* action evaporates into thin air. Reliance upon a possible liability for Federal unemployment taxes hardly suffices as an adequate procedure for determining § 501(c)(3) status.

Petitioner's suggestion of a so-called "friendly" refund suit is even more fanciful. It would be hard to find an individual who is so "friendly" that he would voluntarily file a refund claim, thereby exposing his entire personal income tax return to an IRS audit. A refund claim normally precipitates a search by the IRS for other unrelated issues in order to obtain set-offs. See, *e.g.*, *Lewis* v. *Reynolds*, 284 U.S. 281 (1932); *U.S.* v. *Pfister*, 205 F.2d 538 (8th Cir. 1953); *Larrabee* v. *U.S.*, 37 F.R.D. 61 (S.D. Cal. 1965); *Pacific Mills* v. *Nichols*, 31 F. Supp. 43 (D. Mass. 1939). A refund claim would thus bring into question each and every item on the "friend's" personal income tax return. The investigation initiated by the refund claim could well extend into other taxable years and result in the possible imposition of an assessment for additional taxes for entirely unrelated items. The "friend" of the tax-exempt organization may thus find himself personally liable for amounts or penalties far larger than the minimal amount he contributed to the tax-exempt organization. Few individuals are sufficiently "friendly" to volunteer for such treatment.

To summarize, in ascertaining whether there is "accessibility", it is necessary to weigh heavily the practicalities. This is particularly important where denial of accessibility results in the unnecessary suspension of Constitutional rights. In cases such as the one *sub judice*, an action for injunctive relief is the only practical avenue to the judiciary.

(3) The Inability To Exercise Constitutionally Protected Freedoms For An Inordinate Period Of Time Is A Very Special And Extraordinary Circumstance.

Special recognition must be given to organizations which, like the respondent and *amici*, exist solely for the purpose of protecting or exercising Constitutional rights. The denial of a Constitutional freedom for even one day is intolerable where the denial is unnecessary and avoidable. If petitioner is to prevail in his contention that respondent may contest the Government's actions only in a suit for a refund of unemployment taxes (or similar method), respondent's right to exercise its Constitutionally protected rights will be suspended pending final determination of the litigation. Such restriction is not unavoidable and petitioner has cited no justification for it. The threat of an indeterminate suspension of Constitutional rights is so alarming as to constitute special and extraordinary circumstances within the meaning of this Court's prior decisions.

(4) The *Enochs* v. *Williams Packing* Test Is Satisfied.

Petitioner contends that respondent in this action fails to satisfy the two-part test of *Enochs* v. *Williams Packing & Navigation Co.*, *supra*, and that such failure is dispositive of this action.

First, nothing in *Williams Packing* suggests that the test it established is exclusive in all contexts. This Court was there

considering a case involving employees' withholding tax liabilities. Liability for the tax depended on whether certain fishermen were employees or independent contractors. This issue could have been litigated in a refund suit brought by the same taxpayer involving precisely the same taxes (not some collateral or unrelated tax). The effect of an injunction would have been exactly what 26 U.S.C. § 7421(a) was designed to prevent—an interference with the collection of taxes assessed against the taxpayer itself and a predetermination of the tax liability. The "central purpose of the act" would have been frustrated by the granting of an injunction. In that context, this Court ruled that an injunction would be justified only if, as in *Standard Nut Margarine*, *supra*, it was clear that the Government could not prevail and there would be irreparable injury. But *Williams Packing* in no way extended the thrust of 26 U.S.C. § 7421(a) to situations which it does not cover, *i.e.*, where the primary issue is not the taxes of the complainant. Nor did it purport to apply that statute to an action whose primary purpose is the preservation of basic Constitutional rights. In such cases, the central purpose of the statute is, as previously stated herein, inapplicable and *Williams Packing* simply is no authority for the application of the statute to such situations. *McGlotten* v. *Connally*, *supra*; *Green* v. *Kennedy*, *supra*.

Accordingly, the *Williams Packing* test need not be satisfied in this kind of case. Nevertheless, if the *Williams Packing* test is applicable, respondent in any event satisfies ~~them~~ it.

The controversy in *Williams Packing* was essentially factual. Consequently, the outcome could not have been resolved on a motion for summary judgment. Rather, the case would have had to be tried to determine the facts. This Court, stating that an injunction would not be granted unless it was clear that upon "the most liberal view of the law and the facts" the Government could not prevail, dismissed the complaint.

It is common for many procedural purposes (*e.g.*, a motion to dismiss a complaint for failure to state a cause of action

or a motion for summary judgment) for a court to determine whether there are sufficient facts to support the position of the moving party. Generally, the court assumes that any facts in controversy would be resolved against the moving party. In that context, it is appropriate to say that the court will take a "liberal" view of the facts alleged by one of the parties in the case, and a "strict" view of the facts alleged by the other party.

But a court cannot take either a "liberal" or "strict" view of the law. For a court, there can be only one view of the law—the correct view. It is the function of a court to determine and apply the law without being either "strict" or "liberal".

Where, as here, the facts are uncontroverted, the concept of "liberal" and "strict" becomes irrelevant. Rather, the court should determine how the law applies to such facts. If the law supports the complainant, then the Government cannot prevail and the *Williams Packing* test is satisfied. If, on the other hand, the correct view of the law supports the Internal Revenue Service, then it is clear that the complainant cannot prevail and the *Williams Packing* test would not be met.

On this basis, where the facts, as here, are uncontroverted, and where substantial Constitutional issues are raised, the court must of necessity decide the substantive legal issue in determining whether the *Williams Packing* test has been satisfied. In effect, in such a case the court should view the action as a motion for summary judgment and decide the case on that basis. Such an approach would result in a rapid judicial disposition of the case with a minimum of administrative inconvenience and potential revenue loss, while at the same time affording a rapid resolution of the Constitutional questions raised therein.

CONCLUSION

At issue here is the basic right of tax-exempt organizations to speedy judicial review of an *ex parte* revocation

by petitioner of the organization's § 501(c)(3) status, where the effect of precluding such review might very well mean the demise of the organization and its ability to Conduct Constitutionally protected activities. *Amici* firmly believe that basic principles of due process and equal protection, together with the other reasons set forth herein, grant this right.

Respectfully submitted,

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I, MARTIN B. COWAN, certify that this Motion for Leave to File a Brief Out of Time and Brief of the National Jewish Commission on Law and Public Affairs as Amicus Curias, was served upon FRANK C. SALISBURY, ESQ., 919 18th Street, NW, Room 800, Washington, District of Columbia 20006, attorney for "Americans United" Inc., etc., et al, Respondents, and upon the HON. ROBERT H. BORK, U. S. Department of Justice, Washington, District of Columbia 20539, Attorney for Donald C. Alexander, Commissioner of Internal Revenue, Petitioner, by depositing a true copy of same enclosed in a postage prepaid properly addressed wrapper in a branch of the United States Post Office on this 13th day of December, 1973.

MARTIN B. COWAN